No. 08-1078

In The
Supreme Court of the United States

EAST FIRST STREET, L.L.C. AND
M & B RENTALS OF AMERICA, L.L.C.,
Petitioners,

v.

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX,
Respondents.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal for the First Circuit

BRIEF IN OPPOSITION

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April 23, 2009

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QUESTIONS PRESENTED

1. Does a true conflict exist between this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the decision below from a Louisiana intermediate appellate court that a particular local zoning classification constitutes a background principle under state law?

2. Does a true conflict exist between the decision below from a Louisiana intermediate appellate court that a particular local zoning classification constitutes a background principle under state law and decisions from other courts, including intermediate appellate courts of other states?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants:
East First Street, L.L.C.
M & B Rentals of America, L.L.C.

Intervenors-Appellants:
Cornel Martin
Cynthia Graham Martin

Defendants-Appellees:
Board of Adjustments
City of Thibodaux
Thibodaux City Council

Intervenors-Appellees:
Guy Diebold
Catherine Diebold
David Middleton
Francine Middleton
Chester Boudreaux
Anne Boudreaux
Mary Duplantis

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STATEMENT OF THE CASE

Respondents here address the factual misstatements in the Petition at pp. 3-13:

Page 3: This case does not involve a review of the Louisiana Supreme Court's writ denial. Petitioners overlook the fact that the Louisiana Supreme Court's order declining to review the decision of the Louisiana First Circuit Court of Appeal is not a decision on the merits, much less a decision on "an important question of federal law." The Louisiana Supreme Court's denial of a supervisory writ has "no precedential value." *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16, 24 (La. 2008); *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d 424, 428 (La. 1987). The Louisiana Supreme Court's order declining to review the decision below is also not the judgment reviewable herein under 28 U.S.C. § 1257(a). The reviewable judgment is the First Circuit's judgment on the merits. Gressman et al, SUPREME COURT PRACTICE, § 3.14 at 180 (Ninth Ed.).

Page 3: The properties "at issue" are not "five adjacent small parcels in Thibodaux, Louisiana," as described by Petitioners. The Petitioners in this Court, East First Street, L.L.C. and M & B Rentals of America, L.L.C., own only one of the five tracts that were involved in the zoning classification reviewed by the district court and by the Louisiana First Circuit Court of Appeal.

Page 3, 5: Petitioners incorrectly identify "Cornel and Cynthia Martin" as Petitioners herein.

Page 3, 12: Petitioners claim it is undisputed that the R-1 zone has "totally devalued" their tract (page 3) and "has destroyed" its value (page 12). The tract can continue to be operated as a filling station, although that might not be the most advantageous economic use of the property.

Page 4-5: References to Properties 2 through 5 are irrelevant because neither of the Petitioners owns any of these tracts.

Page 6-8: References to the zoning and variance history of properties not owned by Petitioners are irrelevant.

Page 11: Petitioners incorrectly state that the district court "did not address the petitioners' takings/damages claim." The district court *did* address Petitioners' state law takings and damages claims, as specifically found by the Louisiana First Circuit Court of Appeal. *East First Street, L.L.C. v. Bd. of Adjustments*, 986 So.2d 257 (Table), 2008 WL 2567080 at * 3 n. 2 (La. App. 1st Cir.), *writ denied*, 996 So.2d 1111 (2008).[1]

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[1] Petitioners did not raise any takings claim under federal law; they did raise takings and damages claims under Louisiana law. Art. I, § 4.(B)(1) of the Louisiana Constitution of 1974 provides that property "shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid...." Louisiana law recognizes an action for both a taking and for a damaging under this constitutional provision. *See Avenal v. State*, 886 So.2d 1085, 1113 (La. 2004), *cert. denied*, 544 U.S. 1049 (2005)(Weimer, J., concurring)("Under Louisiana law, a damage claim is compensable although it is not a taking.").

Page 12: Petitioners' statement that, prior to the decision below, no Louisiana court had ever allowed a municipality to change the zoning of a commercial building to residential-only is irrelevant because Petitioners did not challenge the validity of the zoning in the Petition.

INTRODUCTION

The Petition is based entirely on a convenient distortion of the Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* recognized an exception to the rule that a state must compensate a landowner for a regulatory taking that deprives the owner of all economic value. For the exception to apply, the Court required that the regulation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. *Lucas* also required that these background principles must produce the same result as would flow from any one of three sources: first, the State's law of private nuisance; second, the state's power to abate nuisances that affect the public generally; or, third, "otherwise." It is the application of this "otherwise" source of background principles that Petitioners have distorted. *Id.*

Justice Scalia explained the "otherwise" source of background principles in a footnote in *Lucas*:

> The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or

> to forestall other grave threats to the lives and property of others. *Bowditch v. Boston,* 101 U.S. 16, 18-19, 25 L.Ed. 980 (1880); see *United States v. Pacific R. Co.,* 120 U.S. 227, 238-239, 7 S.Ct. 490, 495-496, 30 L.Ed. 634 (1887).

Id. at 1029 n. 16.

It could not be more clear that the "grave threats" source of background principle is only one of the three ways that a government may defend against this type of regulatory takings claims. *Lucas* also specifically armed governmental agencies with defenses based on private or public nuisance laws. Yet Petitioners entirely ignore this fact. Instead, they read *Lucas* as limiting the scope of background principles to "grave threats" alone.[2] Not only is their compression into one source of the three sources of background principles an obvious distortion of *Lucas*, but the court below did not even base its ruling on the "grave threats" defense.

Petitioner's sole Question Presented attempts to read the "grave threats" defense into this case. But it doesn't belong here, and this case doesn't belong in this Court.

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[2] Petitioners claim that "background principles are principles that 1) 'forestall' 'grave threats to the lives and property of others' and 2) are 'cases of actual necessity.'" Petition at 16. Applying their incomplete construct to this case, Petitioners argue that, "[a]pplying *Lucas*' threat-forestalling principle to the instant case, a zoning law that places a house-only zone over a gas station and denies the owner the ability to renovate his building and modernize his business is not an 'actual necessity' and does not prevent any 'grave threats.'" *Id.*

REASONS FOR DENYING THE PETITION

Petitioners invite this Court to "establish once and for all that the lower courts must follow *Lucas'* forestalling grave threats standard." Petition at 23. But they have cited no cases where a court improperly applied *Lucas*. Instead, Petitioners rely on cases where "grave threats" were not involved, as well as cases where courts properly found a "grave threat."

1. The decision below does not conflict with the Court's decision in *Lucas*.

Petitioners state that the "Louisiana Supreme Court, a court of last resort," has decided "an important question of federal law" that conflicts with *Lucas*. Petition at 14.[3] Petitioners' "conflict" argument is based on their mischaracterization of *Lucas* as limiting the source of background principles to "grave threats" alone. Petition at 16. Neither this Court in *Lucas* nor the Louisiana First Circuit in this case limited the application of "background principles" to cases involving "grave threats." Instead, the Louisiana First Circuit relied on one of the other two sources of background principles approved in *Lucas* – *i.e.*, a state's nuisance or zoning laws. There is simply no conflict between the two decisions.

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[3] As previously noted, the Louisiana Supreme Court's order declining to review the decision below is neither a decision on the merits, *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16, 24 (La. 2008), nor the judgment reviewable herein under 28 U.S.C. § 1257(a). The reviewable judgment is the First Circuit Court of Appeal's judgment on the merits. Gressman et al, SUPREME COURT PRACTICE, § 3.14 at 180 (Ninth Ed.).

The Louisiana appellate court found — as *Lucas* and the Court's other decisions allowed it to do — that the City of Thibodaux did not owe Petitioners compensation because the city's 1979 zoning change to a residential classification "is a background principle that is a defense to recovery of damages under Louisiana's takings law." *East First Street, L.L.C. v. Bd. of Adjustments,* 986 So.2d 257 (Table), 2008 WL 2567080 at * 5 (La. App. 1st Cir.), *writ denied,* 996 So.2d 1111 (La. 2008). The First Circuit discussed *Lucas,* and explained:

> Further, there is widespread agreement among the members of the Supreme Court that 'some valid zoning and land use regulations are background principles that bar any takings claim.' Blum and Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses,* 29 Harv. Envtl. L. Rev. 321, 356 (2005).

Id. at * 4.[4]

The First Circuit then examined the Louisiana Supreme Court's decision in *Avenal v. State,* 886 So.2d 1085, *cert. denied,* 544 U.S. 1049 (1995), which addressed federal and state takings claims by a group of Louisiana oyster fishermen. It was undisputed that

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[4] Another example of Petitioners' distortion of the sources of background principles is found in their statement that "the Louisiana courts herein never mentioned the *Lucas* background principle standard." Petition at 22. The correct version of the statement would be that the First Circuit did not mention Petitioners' limited version of background principles. *See East First Street,* 2008 WL 2567080 at * 4-5.

the state's coastal restoration/freshwater diversion project lowered the salinity of water over areas that the state leased to oyster fishermen. In the decision below, the First Circuit quoted from the Louisiana Supreme Court's rejection in *Avenal* of the fishermens' takings claims under state and federal law:

> [C]ompensation is not owed if the state action is in accordance with a 'background principle' of the state's property law that already prohibit[s] the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power.

East First Street, 2008 WL 2567080 at * 5, *quoting Avenal v. State, supra* at 1108 n. 28.

The First Circuit then decided, as a matter of state law, that the 1979 zoning classification is "a background principle that is a defense to recovery of damages under Louisiana's takings law." *Id.* The First Circuit noted that zoning "is a legislative function, the authority for which flows from the police power of governmental bodies," *quoting King v. Caddo Parish Commission*, 719 So.2d 410, 418 (La. 1998), and observed that nothing in the record "suggests that the zoning is somehow invalid or that it was done for a malicious or improper purpose." *East First Street*, 2008 WL 2567080 at * 5. If the Louisiana First Circuit had held that one or more of the *Lucas* exceptions should never apply in a regulatory takings case, a

conflict between this case and *Lucas* might exist.[5] But that is certainly not the case here.

The First Circuit's finding that a zoning ordinance qualified as a background principle did not emerge as might a rabbit from a hat. It was rooted in this Court's previous statements concerning takings claims. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), Justice Kennedy, writing for the majority, recognized that the right to improve property "is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions," *quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The late Chief Justice Rehnquist quoted this passage from *Palazzolo* in his dissenting opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 352 (2002)(Rehnquist, C.J., dissenting).[6]

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[5] In the cited example, a conflict might not even exist because the case below did not present federal takings claims.

[6] *See* Blumm and Ritchie, *Lucas's Unlikely Legacy. The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L.REV. 321, 356 (2005), noting that *Palazzolo*

> did not state that statutes and regulations could never amount to a background principle. Instead, it recognized that at least some statutes are background principles sufficient to defeat a takings claim at the threshold stage.
>
> Justice Kennedy's *Palazzolo* opinion declared that '[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.' Further, Chief Justice Rehnquist's dissent in *Tahoe-Sierra*, joined by Justices Thomas and Scalia, cited this passage from *Palazzolo*, thereby demonstrating

Thus, the decision below does not conflict with *Lucas*.

2. The decision below does not conflict with other cases cited by Petitioners.

Petitioners claim that the decision below conflicts with a decision from the Texas Court of Appeals, the Maryland Court of Special Appeals,[7] the U.S. Ninth Circuit Court of Appeals, and the Louisiana Supreme Court. Petition at 14. This claim is meritless.

Neither the Texas case, *City of Sherman, Texas v. Wayne*, 266 S.W.3d 34 (Tex.App.- Dallas [5th Dist.] 2008), nor the Maryland case, *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996), mentions, much less relies on, the "grave threat" defense or any other type of

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widespread agreement among the Court's members that at least some valid zoning and land use regulations are background principles that bar any takings claim. Although the *Palazzolo* decision declined to decide when legislation can be considered to be a background principle of state law, the Court made clear that '[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of land use proscribed.' (footnotes omitted).

[7] Petitioners incorrectly describe the Maryland Court of Special Appeals as Maryland's court of last resort. Petition at 14, 17. In fact, it is that state's intermediate appellate court, and the Maryland Court of Appeals is the court of last resort in that state. http://www.courts.state.md.us/coappeals/index.html (visited April 21, 2009). The Supreme Court of Texas, not the Texas Court of Appeals system, is that state's court of last resort for civil matters. http://www.supreme.courts.state.tx.us (visited April 21, 2009).

background principle.[8] In addition, the Maryland intermediate court specifically limited its holding in *Steel* to the very unique facts of that case.[9] We assume that Petitioners mentioned these two cases because the court in each case found that a taking occurred under state law and that the governmental entity owed compensation. But that is not the issue that Petitioners ask this Court to consider.

Neither of Petitioners' other two so-called "conflicting" cases actually do so. Both the Louisiana Supreme Court's decision, *Avenal v. State, supra*, and the Ninth Circuit's decision, *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), found there was no taking; therefore, those decisions did not include a *ruling* on whether background principles applied. Petitioners rely on the Louisiana Supreme Court's implicit characterization in *Avenal* of the state's freshwater diversion project as a background principle because "the freshening of these waters in order to prevent further coastal erosion and save Louisiana's coast is a matter of 'actual necessity' as it will 'forestall [a] grave threat to the lives and property of others.'" Petition at 20, *quoting Avenal v. State, supra* at 1108 n. 28, *quoting Lucas, supra* at 1029 n. 16. But this statement of the Louisiana high court was *dicta*, as the

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[8] Petitioners admit that "the court in *City of Sherman v. Wayne* did not discuss a background principles defense." Petition at 19.

[9] *Steel v. Cape Corp.*, 677 A.2d 634, 651 (Md. App. 1995)("We would be remiss if we did not note that our holding, *i.e.*, that the statutory scheme, *as applied in the instant case, where the existing zoning is OS*, is unconstitutional, is limited to the instant case.") (emphasis in original).

court had, earlier in its opinion, found that the diversion program "did not deprive the plaintiffs of all economically beneficial use of their property," and thus did not constitute a taking under state law. *Avenal, supra* at 1107.

Hewing to their incomplete definition of background principles, Petitioners claim that the Ninth Circuit in *Esplanade Properties* "restated *Lucas'* definition of background principles being 'cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others.'" Petition at 21, *quoting Esplanade Properties, supra* at 987. Petitioner's incomplete statement of the Ninth Circuit's larger quotation from *Lucas* – which included this Court's entire discussion of background principles – cannot hide the plain fact that *Esplanade Properties* does not conflict in any way with the Louisiana First Circuit's decision in this case.

There is no indication from the four supposedly "conflicting" cases that any of those courts – or this Court -- would reach a different result than did the Louisiana First Circuit in this case. This case does not satisfy the Court's criteria for reviewing a case on the basis of conflict. Sup.Ct. R. 10.

3. The issue decided by the court below does not merit this Court's review.

Petitioners have attempted to transform this fact-specific case addressing claims under Louisiana law into one involving "an important question of federal law." Petition at 14. Even if this case did present such a question, it would not be an appropriate medium for the Court to review the issue. If, as Petitioners

contend, this Court has not explicitly decided whether a "value-confiscating, use-changing zoning provision is a background principle," Petition at 17, that fact weighs against this Court's review. The issue of what a Louisiana court considers to be a background principle under Louisiana law is not an issue that merits the Court's attention. The issue is not only fact-intensive, it will affect no litigants outside the State of Louisiana and few within it.

The decision below is only the second reported Louisiana decision that addresses the question of what constitutes a background principle in a takings case. The first such decision, *Avenal v. State, supra,* addressed the issue in *dicta*. The decision below is an unpublished unanimous opinion that affirmed the decision of the trial court (which had, in turn, affirmed the decision of the Board of Adjustments of the City of Thibodaux). Given these circumstances, the issue of background principles is not mature under Louisiana law, and does not merit the Court's review.

4. The decision below was correctly decided.

Petitioners' substantive quarrel is with the Louisiana First Circuit's application of *Lucas* to state law claims. The First Circuit correctly found that valid zoning and land use regulations are a defense to this type of regulatory takings claim.

The First Circuit held that zoning "is a legislative function, the authority for which flows from the police power of governmental bodies." *East First Street L.L.C.*, 2008 WL 2567080 at * 5, *quoting King v. Caddo Parish Comm'n*, 719 So.2d 410, 418 (La. 1998). Accordingly, the court below correctly found that the

City of Thibodaux's zoning ordinance was a background principle under Louisiana law, based on the fact that (1) it had been in place since 1979, and (2) the record did not suggest that the zoning was either invalid or that it had been enacted for a malicious or improper purpose. *East First Street*, 2008 WL 2567080 at * 5.

Louisiana law makes clear that the fact that a zoning ordinance does not permit an owner the most advantageous economic use of his or her land does not render the ordinance invalid. *Hernandez v. City of Lafayette*, 399 So.2d 1179, 1185 (La. App. 3rd Cir.), *writ denied*, 401 So.2d 1192 (La. 1981), *appeal dismissed*, 455 U.S. 901 (1982). And an unconstitutional taking of property does not result merely because an owner is unable to develop the property to its maximum economic potential. *Standard Materials, Inc. v. City of Slidell*, 700 So.2d 975, 984 (La. App. 1st Cir. 1997); *State, Dep't of Social Servs. v. City of New Orleans*, 676 So.2d 149 (La. App. 4th Cir. 1996); *Robertson v. Jefferson Parish*, 465 So.2d 787, 791 (La. App. 5th Cir. 1985).

Because the Louisiana First Circuit Court of Appeal applied the appropriate standards and correctly found that Petitioners were not entitled to compensation, this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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